IN THE SUPREME COURT OF ZAMBIA **Appeal No. 80/2017**

HOLDEN AT KABWE

(Criminal Jurisdiction)

BETWEEN:

SAVIOUR MUKANSO **APPELLANT**

AND

THE PEOPLE **RESPONDENT**

CORAM: Musonda, Kabuka and Chinyama JJS
on 10th April, 2018 and 7th August, 2018

For the Appellant: Mr. C. Siatwinda, Counsel, Legal Aid Board

For the Respondent: Ms M. K. Chitundu, National Prosecutions Authority

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JUDGMENT

MUSONDA, JS, delivered the Judgment of the Court

Cases referred to:

1. **David Zulu v. The People [1977] Z.R. 151**
2. **ZICO Kashweka Lawrence Mungunda Chimbinde v. The People (2007) Z.R. 37**
3. **Bwanausi v. The People (1976) Z.R. 115**
4. **Mbinga Nyambe v. The People (2011) Z.R. 246**
5. **Teper v. R [1952] ALL 480**
6. **Kape v. The People (1977) Z.R. 192**

7. **Saidi Banda v. The People SCZ SELECTED JUDGMENT NO. 30 OF 2015**
8. **P. L. Taylor & Others v. R 21 Cr. App. R.20**
9. **R v. De Villiers 1944 AD, 493**
10. **Naweji v. The People (1981)**, drawn from **Hatchard, J & Ndulo, M, (2013) *The Law of Evidence in Zambia*, 1st edition, (Printech, Lusaka)**

Legislation referred to:

1. **Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia**
2. **Section 201 (2) of the Penal Code, CAP.87**
3. ***Oxford's Dictionary of Law* (7th edition)**
4. ***Longman Dictionary of Law* (7th edition)**

Other works referred to:-

Hatchard, J & Ndulo, M, (2013) *The Law of Evidence in Zambia*, 1st edition, (Printech, Lusaka)

The appellant was convicted of the offence of murder by a High Court Judge sitting at Mansa. The appellant's conviction and consequential infliction of the ultimate sentence of death upon him were founded on **Section 200 of the Penal Code, Chapter 87 of the Laws of Zambia.**

The appellant's conviction was almost exclusively founded on pieces of circumstantial evidence which had pointed to the appellant's culpability for the offence in question. That evidence was also supported by the evidence of the medical officer ("PW7")

who had conducted a postmortem examination upon the body of Maybin Mutale, ("the deceased"). For the removal of doubt, the postmortem report which PW7 had tendered in evidence in the court below had discounted the appellant's version as to how the deceased, whose only company at the time of his death was the appellant, had met his unexpected demise.

The particulars of the offence for which the appellant had stood arraigned in the court below were that on the 9th day of January, 2013, at Mwense, in the Mwense District of the Luapula Province of the Republic of Zambia, the appellant did murder Maybin Mutale.

The evidence upon which the conviction of the appellant was secured was tendered by seven (07) prosecution witnesses.

Having regard to the fact, as earlier noted, that the appellant's conviction was almost exclusively anchored on circumstantial evidence, it is necessary and appropriate that we recount the material circumstances under which the deceased had met his demise and how, in the estimation of the court below, those circumstances had implicated the appellant. For the avoidance of

doubt, the narration to which we now turn was distilled from the evidence of the appellant by the trial court.

On 7th January, 2013 a group of young men numbering 8, including the appellant, his friend by the name of Albert Mushibwe and the deceased had gathered at Chikashi Muyembe ("PW5")'s house at Lukwesa Village, Chief Lukwesa in Mwense District for the purpose of planning a fishing expedition on the Luapula river.

At about 14 or 14:30 hours on the same day, the appellant and the deceased set off for the Luapula river. The duo was using a canoe which they had hired for the purpose. At about 16:00 hours, the appellant and the deceased arrived at a place called Kansofwa where they found PW4, Albert Chibale, who informed the duo that he was waiting for some people that he was working with. It appears from the evidence below that on the advice of the appellant and the deceased, PW4 resumed his journey to his destination. The trio (that is, PW4, the appellant and the deceased), thereafter re-united at a place called Chiba where they arrived at 18:00 hours. Upon reaching Chiba, the appellant decided to cross the Zambia/Democratic Republic of Congo (DRC)

border and entered DRC for the purpose of securing the services of officers from that country's Department of Fisheries.

While the appellant was away to the DRC, the deceased and PW4 remained at Chiba.

During the early hours of 8th January, 2013, that is, at about 03:00 hours, the deceased telephoned the appellant for the purpose of establishing how the former was doing where he had left him (i.e. at Chiba). The appellant informed the deceased that he was well. Likewise, the deceased informed the appellant that he too was well. After the above exchanges between the appellant and the deceased, the latter sought to have the former fetch him from Chiba so that they could return home as he, the deceased, complained of sustained mosquito bites.

Accordingly, the appellant paddled his canoe back to Chiba from where he fetched the deceased before proceeding to Kansofwa where they stopped over before the two resumed their journey around 04:00 hours. It is worthy of note here that, at the time when the appellant fetched the deceased from Chiba and set off for Kansofwa, PW4 had also set off alone in his own canoe. The three

(that is, the appellant, the deceased and PW4) subsequently met at Kansofwa.

According to the appellant's testimony, following the resumption of his canoe journey with the deceased, the appellant was informed by the latter that he was feeling sleepy and dizzy. The appellant had further testified that, as he was paddling the canoe at about 05:00 hours, he saw as *if "someone had lifted the deceased from where he was"* and that, thereafter, the deceased had hit his head against the canoe and that, subsequently, both he and the deceased, fell into the river. According to the appellant, following the incident described above, he started swimming towards the shore of the river and had assumed that the deceased was also swimming towards the same area. As it happened, the deceased had not been swimming. According to the appellant, he subsequently established that the canoe which he and the deceased had been using had capsized and that the deceased had drowned and died.

As we noted early on in this judgment, when the appellant was tried for murder, the prosecution called seven (07) witnesses.

The first prosecution witness ("PW1") was David Shaban Mutale who was the deceased's young brother.

PW1 told the court below that, on 9th January, 2013, he learnt through a phone call that he received on that day that his brother had passed on after drowning in the Luapula river. On the same day, PW1 travelled to Mwense from Ndola where he resided and arrived there the following morning.

PW1 further informed the court below that, upon arriving in Mwense, he and some of his relations joined the team which had been constituted for the purpose of searching for the body of the deceased and subsequently proceeded to the Luapula river to undertake the search.

Following the search, the body of the deceased was located and duly identified by PW1 as that of the deceased. Upon examining the body of the deceased, PW1 noticed that it had blood in the nose while the hands were in a half-raised position. PW1 also noticed that the deceased's stomach was flat and the body fully dressed. Subsequently, PW1 took the deceased's body to the local mortuary.

On a Saturday of the same week, PW1 made a report at Mwense Police Station to the effect that, contrary to the report which he had received on phone, the state in which the body of the deceased was found following its retrieval from the Luapula river was not consistent with that of a person who had met their death by drowning.

Following the above report, three suspects, including the appellant, were apprehended and detained at Mwense Police Station for questioning in connection with the death in question.

On 13th January, 2013 a postmortem examination was conducted on the body of the deceased by PW7, a medical doctor at Mansa hospital in the presence of PW1 who had identified the deceased's body as that of his elder brother.

According to PW1, as the autopsy was being undertaken by PW7, he, among other things, noticed some blood in the deceased's nose, while his liver had blood clots. PW1 also noticed that when the deceased's stomach was opened up, there was only blood and no water.

According to PW1, if the deceased had died from drowning, the ribs/rib cage would have been whitish in colour and not the reddish state in which they were.

During the trial of the appellant, PW1 identified him as one of the three suspects that had been apprehended and detained at Mansa Police Station.

Under cross-examination, PW1 told the trial judge that the person who had phoned him for the purpose of informing him about the death of his brother was his cousin, Edward Shaban. Upon being asked as to how his cousin, Edward Shaban, had come to know that the deceased had died by drowning, PW1 told the court below that it was the person who had been with the deceased at the time of his death, (the appellant) who had informed his cousin that the deceased had drowned.

The prosecution's second witness ("PW2") was Manase Mwange whose brief testimony was that she was one of the persons who saw the body of the deceased following its retrieval from the Luapula river. According to PW2's testimony, when the deceased's body was retrieved and placed under a mango tree it had visible

injuries on the neck while fresh blood was oozing out of the body's nose. The witness further testified that the deceased's stomach was not swollen while his eyes were closed and not swollen.

PW2 further informed the court below that she had previously seen five (05) bodies of persons who had died as a result of drowning in water and that, from her experience, what she had noticed was that a person who dies as a result of drowning would have a swollen tummy, swollen and popped up eyes and a whitish skin. In the case of the deceased, none of what has been described above was apparent from his body.

When PW2 was cross-examined, she told the court below that, of the five bodies of persons that she had seen that had met their demise by drowning, one had remained in water for a day while another had remained there for two days.

The prosecution's third witness ("PW3") was Astridah Chongo who told the trial court that, on the morning of 8th January, 2013, her husband, Mutale Maybin (the deceased) informed her that he was going to Musangu to see a friend.

According to PW3, shortly after the deceased had set off for Musangu, he returned home. This surprised PW3 who sought to know why the deceased had returned after such a brief period of time. The deceased responded by telling PW3 that Muyembe (PW5) had telephoned him because he, PW5, wanted the deceased to do something for him. The deceased subsequently proceeded to see PW5 and, upon his return, was asked by PW3 as to why PW5 wanted him. PW3 was informed by her deceased husband that PW5 wanted him (the deceased) to go to Congo so that he could be alerting him and other fishermen to the approach of Congolese officials pursuing persons with fishing nets on the Luapula river.

PW3 further testified below that when she sought to know from the deceased as to the mode of transport which he was going to use to travel to Congo, PW3 was informed that PW5 had arranged a canoe and that, as the deceased did not know how to paddle a canoe, he was going to travel with the appellant who was going to do the paddling.

PW3 also told the trial judge that, soon after the deceased had finished telling her about the imminent trip, the appellant arrived at PW3 (and the deceased)'s house. This was around 14:30 hours.

The appellant immediately informed the deceased that PW5 wanted him and the deceased to immediately start off, whereupon the duo left the deceased's house.

PW3 further testified that, at about 06:30 hours the following morning, a lady by the name of Doreen went to her (PW3's) house and informed her that her (PW3's) husband had died in the Luapula river.

PW3 also informed the court below that she had known the appellant for 6 months before the latter's visit to her home on 8th January, 2013. PW3 confirmed this fact when she identified the appellant in the course of his trial in the court below. This witness also confirmed that she knew PW5 as he was their neighbour.

When PW3 was cross-examined by the defence, she informed the trial court that the deceased never took alcohol. However, she confirmed that the appellant was a known drinker of a traditional alcoholic beverage known as 'kachasu'.

In her further cross-examination testimony, PW3 told the trial court that she was surprised that PW5 had telephoned her husband on 8th January, 2013 because the two were far from being

good friends. She also informed the trial judge in cross-examination that when the deceased and the appellant set off for the Luapula river, they did not pass through PW5's house but had proceeded straight to the river.

The prosecution's fourth witness was Albert Chibale ("PW4") whose evidence was that, on 7th January, 2013, he and the group he was working with had set off for the Luapula river. PW4 set off alone in a canoe. His destination was Chiba while his role was similar to the one which PW5 had assigned to the deceased, namely, that of alerting his fishing group to the approach of Congolese officials. PW4 further informed the trial court that, on his way to Chiba he stopped over at Kansofwa so that the group which he had left behind could find him there and proceed with him to their final destination. While PW4 was waiting at Kansofwa with his canoe out of the river, the deceased and the appellant arrived. PW4 informed the appellant and the deceased that he was also travelling to Chiba but had stopped over so that he could be joined by the group which he had left behind. On hearing this, the appellant and the deceased advised PW4 to proceed on his journey since the persons that he was waiting for were on their way and

would eventually join him. PW4 heeded the appellant/deceased's advice and decided to resume his journey. As before, PW4 continued in his own canoe while the deceased and the appellant continued in their own.

When the appellant and the deceased, on the one hand, and PW4, on the other, reached Chiba, they stopped on the Zambian side. The appellant then told PW4 and the deceased that he was going to cross-over into the DRC territory and advised the latter (PW4 and the deceased) to remain on the Zambian side. The appellant accordingly crossed over into the DRC around 18:00 hours and only returned to the location where he had left PW4 and the deceased around 03:00 hours. PW4 had remained with the deceased during the entire period that he appellant had been away.

Following the appellant's return, the trio (i.e. PW4, the appellant and the deceased) set off for home; with the appellant and the deceased in their canoe while PW4 was alone in his.

PW4 told the trial judge that when he eventually reached his home, he briefly slept before he was awakened by his wife who informed him that the deceased had died on the river.

In the course of the appellant's trial, PW4 duly identified him and informed the trial court that he had known the appellant for two years prior to the 7th January, 2013. He further confirmed that he and the appellant had been working together on the Luapula river. PW4 also testified that when he met the appellant and the deceased at Kansofwa, the duo looked well and fine just as they were when they parted at Sumbu Island on their way back home.

Under cross-examination, PW4 told the trial court that he was in a different group from that to which the deceased and the appellant had belonged. PW4 further testified that when he met the appellant and the deceased at Kansofwa, the latter did not dock their canoe and that the canoe was not carrying anything at the time.

PW4 also informed the trial court under cross-examination that his canoe was faster than the one which the deceased and the appellant had been using. The witness further testified that at the time when he left the appellant and the deceased as the trio was separately heading home, the deceased and the appellant were neither quarrelling nor arguing about anything.

The prosecution's fifth witness ("PW5") was Chikashi Muyembe whose evidence was that on 7th January, 2013 he was visited at his home by a group of 8 young men around 07:00 hours. The young men asked PW5 if they could use his fishing net to catch fish on the Luapula river. PW5 gave the young men his fishing net together with a sum of K45.00 (rebased) for the purpose of buying airtime and food. Among the persons who were in this group was the appellant whom PW5 identified and confirmed having been known to him for two years.

According to PW5, the 8 young men had divided themselves into groups in accordance with the tasks which they were to carry out in relation to their fishing expedition. In this regard, the deceased and the appellant were assigned the role of alerting those who were to man the fishing nets to the approach of Congolese patrolling officials. The two also travelled together in the same canoe.

After encountering communication challenges, PW5 re-established contact with the appellant after he had returned home. At that time, the appellant was wearing a wet pair of trousers but without a shirt on. The appellant informed PW5 that as he and the

deceased were paddling their canoe, the deceased went on one side thereby causing it to capsize and that, in consequence, he had drowned and died.

Under cross-examination, PW5 told the trial judge that he was one of the persons who had participated in retrieving the deceased's body out of the Luapula river. The witness also told the court below that the appellant had earlier told him that the deceased had dozed off and moved to one side of the canoe where he had hit himself against it.

According to PW5, the appellant and the deceased were on good terms, hence his decision to pair them together on the fishing expedition in question.

The prosecution's 6th witness ("PW6") was Constable Museleka. PW6's evidence was that, on 10th January, 2013 he was on duty when a report of a suspected murder was received from David Shaban Mutale of Ndola who had complained that his brother - the deceased - had been murdered on the Luapula river.

PW6 further informed the trial court that, following the opening of a docket in respect of the complaint in question, he

conducted investigations which revealed that the only person who was with the deceased at the time when he met his demise was the appellant.

PW6 also testified that an autopsy was subsequently conducted on the body of the deceased by a Dr. Dubinini ("PW7") after the same had been identified by PW1.

PW6 further testified that as the postmortem report by PW7 had ruled out drowning as the cause of the deceased's death, he proceeded to interview the appellant for the second time before charging him with the offence of murder. PW6 further confirmed that the appellant had denied having murdered the deceased.

According to PW6, he had proceeded to arrest and charge the appellant with the offence of murder on account of what the report relating to the autopsy which PW7 had conducted on the deceased's body had revealed as well as the evidence of the various witnesses involved.

The last witness who testified on behalf of the prosecution was Dr. Angrii Dubinini ("PW7") of Mansa General Hospital) who

confirmed that, on 13th January, 2013, he conducted a postmortem examination on the body of the deceased.

PW7 further confirmed that, according to his findings, the cause of the deceased's death was Acute Respiratory failure due to trauma of the lungs. In his report, PW7 ruled out drowning as the cause of the deceased's death on the basis that there was no water in the deceased's body's airways. In PW7's opinion, there had been a rupture of the deceased's lungs which had been caused by a blunt trauma. PW7 further found that the deceased had bled from both his nose and mouth. In medical terms the deceased had been a victim of *'subcutaneous emphysema of the face and chest'* which meant that he had been hit by something. PW7's autopsy report also revealed that the deceased had suffered trauma in the abdomen as evidenced by the rupturing of his spleen.

Under cross-examination, PW7 confirmed that in a death arising from drowning, emphysema should characterize the entire body of a deceased person as opposed to being merely confined to one body area which, in this case, was the deceased's body's chest.

PW7 also testified that, in order for a deceased person to have the kind of haematoma which the deceased had, he ought to have fallen from a height of 4-5 metres and not a one metre height.

Upon being further questioned, PW7 told the trial judge that a rupture of lungs and spleen can only result from a road accident, severe beating or from a fall from a height of about 5 to 6 metres. PW7 described all these as constituting blunt trauma.

At the close of the prosecution's case, the appellant was found with a case to answer and put on his defence.

In his defence, the accused gave sworn testimony but called no witnesses.

We would pause here to confirm that part of the appellant's testimony has been recounted in the context of the background narrative surrounding the deceased's demise.

Aside from what we recounted in the background narrative, the appellant told the court below that, following the events which had led to the death of the deceased, he had started shouting for help. The appellant eventually met the father to Kabu to whom he had narrated what had transpired.

Between 06:00 hours and 07:00 hours, the appellant met PW5 to whom he also narrated his story. The appellant further informed the court that later on that day, he went with the search party to the location where the canoe that he and the deceased had been using had capsized to search for the deceased's body. The body of the deceased could not, however, immediately be located but was only located on 9th January, 2013.

The appellant further told the trial judge that he was subsequently arrested and charged with the murder of the deceased.

Under cross-examination, the appellant first told the court below that as he was paddling the ill-fated canoe back to the village, the deceased had sat in front. Later, the appellant changed his story and informed the trial judge that both he and the deceased were paddling the canoe. The appellant also reiterated that, as they were paddling, he was 'surprised' when he saw as if *"someone had ... lifted (the deceased) from where he was and thereafter ... hit his head [against] the canoe..." and that was how he and the deceased fell into the river."*

Following the closure of the defence, counsel for the prosecution submitted that, although no one had seen how the deceased had met his death, there was strong circumstantial evidence which led one to draw the inference that the appellant was the one who had been responsible for the deceased's death. This submission by the prosecution was predicated upon the evidence that the appellant was the person who was last seen with the deceased. Counsel for the prosecution further submitted that the key factor which had pointed to the appellant's culpability was the evidence of PW7 who had ruled out drowning as having been responsible for the deceased's death.

Counsel for the prosecution also submitted that no defence had been raised by the appellant, then accused, adding that there was even no evidence of drinking or provocation around the murder in question. The prosecution's counsel accordingly urged the court below to find the appellant guilty of murder.

For his part, counsel for the appellant submitted that the prosecution had failed to prove the appellant's guilt beyond all reasonable doubt. In the view of defence counsel, there were several inferences which could be drawn from the circumstances

under which the deceased had met his demise, including the inference that the deceased had hit himself against the canoe and drowned. Another inference, according to defence counsel, was that when the deceased fell into the river, other objects could have been responsible for the injuries which he had sustained. Defence counsel went on to refer the trial court to the case of **David Zulu v. The People**[1] where we pointed out that where there are two or more likely inferences, it has always been a cardinal principle of criminal law that the court should adopt the inference which is favourable to the accused. Counsel also criticized the medical evidence of PW7 which he contended constituted his own opinion. Counsel did, however, accept that PW7 was very categorical in his evidence to the effect that no water was found in the deceased's body during the postmortem exercise.

Counsel for the defence also put forward an alternative argument, namely, that in the event that the court found the appellant to have been responsible for the deceased's death, the court should find that there was no malice aforethought on the part of the appellant and, consequently, invited the court below to convict the appellant for the lesser offence of manslaughter. In the

view of the defence counsel, the element of malice aforethought had not been conclusively determined in the matter and that, consequently, it was not appropriate to convict the appellant for murder. Lastly, the defence counsel submitted that in the event of the trial court determining that malice aforethought had accompanied the commission of the crime of murder in this matter, the court should, nevertheless, find that there were extenuating circumstances surrounding the commission of the offence in question.

In reply, counsel for the prosecution submitted that in the **David Zulu case**[1], this court had guided that in order for an accused to benefit from the respite which we had espoused in that case, they ought to have offered a logical explanation regarding the circumstances under which the deceased would have met his/her demise. In the context of the matter at hand, counsel for the prosecution argued that the deceased had died prior to being thrown in the river.

In her judgment, the learned trial judge identified the key ingredients of the offence of murder which the prosecution had the

responsibility of proving or establishing beyond reasonable doubt. These ingredients were identified as:

(a) That a death had occurred or arisen;

(b) That the accused had been responsible for such death;

(c) That in causing the said death, the accused had the requisite malice aforethought; and

(d) That the accused had no lawful justification for causing the deceased's death.

The trial judge then proceeded to review the evidence which had been placed before her on behalf of the prosecution and came to the conclusions which we now turn to.

Firstly, so far as the death of the deceased was concerned, the judge confirmed that there was no dispute indeed that the deceased had died.

Secondly, as to whether or not the death of the deceased had been attributable to the appellant, the trial judge reviewed the evidence of PW1, PW2, PW3, PW4, PW5 and PW7 as recounted early on in this judgment and arrived at the following

determination (at pp. J28-29 of the judgment or pp. 141-142 of the Record):

> **"(Although I am) aware that the opinion of the doctor [PW7] in this matter is his own opinion, [however] having heard his evidence and having looked at the postmortem examination report [relating to the deceased] coupled with the evidence of the other prosecution witnesses, the only inference I can make [even considering several other possible inferences] ... is that the deceased did not die from drowning, but from severe beating as stated by [the doctor]. I am fortified [in arriving at this conclusion] by the [doctor's] finding that there was no water in the [deceased's body's] airways and that the deceased person's stomach was flat. Having found so, I further find from the evidence adduced by the prosecution, that the only person who could have beaten the deceased was the [appellant] as he was the one who was last seen with the deceased... and in my strong view, he deliberately delayed his return home when PW4 left him with the deceased so that he can execute the unlawful act... PW7 spoke of blunt trauma on the chest. In my view the [appellant] must have used the paddle to hit the deceased...**
>
> **The evidence of the [appellant] himself shows that as they were paddling back home... the deceased was sitting in front of the [appellant] who was paddling... this [made] it easier for the [appellant] to hit the deceased... I am, therefore, satisfied that the [appellant] is the one who caused the death of the deceased..."**

The learned trial judge also concluded that the appellant had the requisite malice aforethought when he caused the death of the deceased and that he had no lawful justification for his act.

With regard to the question of extenuating circumstances as directed by Section 201(2) of the Penal Code, CAP.87, the learned judge recited a passage from our decision in **ZICO Kashweka Lawrence Mungunda Chimbinde v. The People**[2] and came to the conclusion that the evidence on record made it abundantly clear that no extenuating circumstances existed which would have served to moderate the punishment which the offence of murder otherwise attracts.

The learned judge accordingly returned a verdict of guilty of murder and sentenced the appellant to death by hanging.

The appellant has now appealed to this court against both his conviction and sentence on the basis of a solitary ground which was expressed in the following terms:

> **"The learned trial judge erred in law and in fact when (she) convicted the appellant on circumstantial evidence despite guilt not being the only reasonable inference in the circumstances of the case."**

Learned counsel for the appellant filed written Heads of Argument to buttress the above lone ground of appeal. In those arguments, counsel contended that no direct evidence was placed

before the court below by the prosecution to support the allegation that the appellant had killed the deceased adding that the trial court had merely relied on circumstantial evidence.

According to the appellant's counsel, the trial court had not even correctly approached the circumstantial evidence which had been placed before it as this court had guided in **Bwanausi v. The People**[3], **Zulu v. The People**[1] and **Mbinga Nyambe v. The People**[4]. In this regard, counsel recited the following passage from the judgment now being assailed by way of demonstrating what he perceived as the trial court's misdirections:

> **"In my view, the accused person must have used the paddle to hit the deceased... on the chest and on the ribs to cause the blunt trauma which PW7 [had] observed. The evidence of the accused himself... shows that as they were paddling back home after PW4 had left the deceased was sitting in front of the accused who was paddling (which) indicates that it was easier for the accused to hit the deceased."**

Arising from the above passage, the appellant's counsel wondered how it could have been possible for the appellant who had been seated behind, in a small canoe to hit the deceased on the chest. According to counsel it was impossible or impracticable for the appellant to hit the deceased on the chest.

The appellant's counsel's further contention was that, as the deceased had been left with PW4 from 18:00 hours to 03:00 hours, it was possible that he (the deceased) could have been beaten by PW4 given that he also had the same opportunity that the appellant had. In counsel's view, the trial court ought to have considered the other inferences which could have been drawn from the circumstances around the deceased up to the time of his demise.

The appellant's counsel further contended that the dizziness that the deceased had complained about could have been a result of internal bleeding resulting from injuries which the deceased might have sustained between 18:00 hours and 03:00 hours when the deceased had been left alone with PW4.

Counsel for the appellant also suggested that PW4's conduct had been suspicious as he had suddenly decided to paddle his canoe faster and leaving the appellant and the deceased behind.

Finally, counsel for the appellant submitted that, not only did the appellant not have any motive for attacking the deceased, his conduct in not having run away, reporting the incident to the villagers and participating in the search for the deceased's body

was not consistent with the guilt inference which had been drawn against the appellant.

We wish to observe, as we begin to give our reflections around the lone ground canvassed in this appeal, that although the learned trial judge made no direct reference to this fact (and notwithstanding counsel for the prosecution's specific submission upon it), it is doubtless that the conviction of the appellant for the offence in question was founded on that class of evidence known as circumstantial evidence.

In the case of **Mbinga Nyambe v. The People**[4], we adopted the following characterization or description of circumstantial evidence from *Oxford's Dictionary of Law* (7th edition):

> **"Circumstantial evidence (indirect evidence) [is] evidence from which the judge or jury may infer the existence of a fact in issue but which does not prove the existence of the fact directly."**

For its part, the *Longman Dictionary of Law* (7th edition) describes 'circumstantial evidence' as:

> **"Evidence resting on inference, not observation or other personal knowledge. Evidence of (collateral) facts not in issue from which can be inferred a fact in issue, e.g. evidence that skid-marks made by the defendant's motorcycle were on the wrong side of the road;**

facts supplying a motive for an act; facts concerning capacity to do an act..."

Quoting from the English case of Teper v. R[5], the authors of the same dictionary (The Longman) observe that: circumstantial evidence... "...must always be narrowly examined."

In **David Zulu v. The People**[1] we observed/held that:

"(i) It is a weakness peculiar to circumstantial evidence that by its very nature it is not direct proof of a matter at issue but rather is proof of facts not in issue but relevant to the fact in issue and from which an inference of the fact in issue may be drawn.

(ii) It is incumbent on a trial judge that he should guard against drawing wrong inferences from the circumstantial evidence at his disposal before he can feel safe to convict. The judge must be satisfied that the circumstantial evidence has taken the case out of the realm of conjecture so that it attains such a degree of cogency which can permit only an inference of guilt.

In **Bwanausi v. The People**[3], this court observed, via Baron, DCJ, that:

"...where a conclusion is based purely on inference that inference may be drawn only if it is the only reasonable inference on the evidence; an examination of alternatives and a consideration of whether they or any of them may be said to be reasonably possible cannot be condemned as speculation..." (at p. 20)

Thus in **Kape v. The People**[6] we noted that:

> **"When a court purports to draw an inference of guilt... it is necessary to consider what other inferences might be drawn."**

In **David Zulu v. The People**[1], we pointed out that:

> **"Where two or more inferences are possible it has always been a cardinal principle of the criminal law that the court will adopt one which is more favourable to an accused if there is nothing in the case to exclude such inference."**

In our more recent decision in **Saidi Banda v. The People**[7], we acknowledged, on the faith of the English case of **P. L. Taylor & Others v. R**[8] that, in spite of the avowed *'weaknesses'* normally associated with circumstantial evidence, there are instances when it is *'probably good'* or *'even better'* than direct evidence. Thus in **Taylor & Others v. R**[8], Lord Hewart, CJ made the following observations:

> **"It has been said that the evidence against the applicants is circumstantial so it is, but circumstantial evidence is very often the best. It is evidence of surrounding circumstances which, by undesigned coincidences, is capable of proving a proposition with the accuracy of mathematics."**

Having regard to the principles which we have articulated above, can it be said that, in the context of this case, the trial judge had correctly applied them? Can it be said that the trial judge had guarded against the possibility of drawing wrong inferences from

the evidence which was at her disposal before she handed down the conviction? Did the court consider what other possible inferences could have been drawn from the evidence which had been deployed before her? Indeed, did the trial judge satisfy herself that the circumstantial evidence which had been deployed before her had taken the case out of the realm of conjecture and attained such a degree of cogency which could permit only an inference of guilt?

In **Saidi Banda**[7] we suggested that where the prosecution's case depends wholly or partially on circumstantial evidence, it is critical for the court to satisfy itself that certain basic facts have been established. Those basic facts, taken independently of the others, cannot point to the guilt of the accused person. However, after a court has satisfied itself with regard to the presence of the relevant basic facts envisaged, it (the court) must then satisfy itself that those basic facts, taken together, 'implicate the accused' in such a manner as points to nothing less than his guilt.

In the South African case of **R v. De Villiers**[9], the dealing court held that a court should not consider each circumstance in isolation and draw inferences from each single circumstance; that

the onus on the prosecution is not to prove that each separate piece of evidence or *'basic fact'* (to borrow the nomenclature we employed in **Saidi Banda**[7]) is inconsistent with the innocence of the accused but that, taken as a whole, the cumulative facts, or pieces of evidence do, beyond reasonable doubt, discount or negative such innocence.

In her judgment now under attack, the learned trial Judge noted a number of factors and made certain key findings which had informed the conclusion which she reached in finding the appellant guilty.

To start with, the learned Judge noted that PW3, Astridah Chungu (the deceased's wife), saw the appellant when the latter went to the former (and the deceased)'s house on 7th January, 2013 around 14:30 hours and that she, PW3, confirmed that the deceased had left with the appellant when the duo set off for the Luapula river. The trial Judge further noted that the following morning, PW3 received information to the effect that her husband had died on the river. The trial Judge also established that PW4, Albert Chibale, had seen the appellant and the deceased together on the Luapula river on 7th January, 2013 at an area known as

Kansofwa where he, PW4, had stopped over and that he even spoke to both the appellant and the deceased. According to the Judge below, the evidence which had been placed before her Ladyship revealed that the appellant and the deceased had been together from around the afternoon of 7th January, 2013 up to about 04:00 hours on 8th January, 2013 and that the only period when the two (that is, the deceased and the appellant) were not together was when the appellant had crossed over into the Congo around 18:00 hours before returning to Chiba around 03:00 hours. Over that intervening period, the deceased had remained with PW4 at Chiba.

The court also established that no evidence had been placed before it to suggest that during the period that the deceased had remained with PW4, any fighting had taken place between the deceased and PW4 or, indeed, between the deceased and anyone else. In point of fact, the evidence which PW4 had laid before the trial court had ruled out the possibility of any fight or any differences having arisen between PW4 and the deceased over the entire period that the two had remained together at Chiba. In the trial Judge's estimation, what has been described above was confirmed by the appellant's own evidence.

According to the evidence of PW4, when the trio (that is, the deceased, the appellant and himself) set off on their return journey, the deceased and the appellant were together in one boat while PW4 was alone in his boat. At that time, PW4's evidence confirmed, the deceased was fine. In fact, the deceased remained fine even when the trio subsequently re-united at Kansofwa as they separately continued on their home-bound journey. The trial Judge wondered how the deceased, who was seen in good health and apparently fine by PW4 around 04:00 hours, could have died without any sign of drowning a few hours later, apparently as a result of some blunt trauma.

In her reasoning, the learned trial Judge discounted the possibility that the blunt trauma which PW7 (the doctor who had conducted a postmortem examination on the deceased's body) found on the deceased's body could have been caused by aquatic animals or fish or even tree stumps in the river. The Judge also discounted the possibility that the deceased could have died as a result of having fallen on the side of the boat or canoe as the appellant had alleged in his evidence. The learned Judge reasoned, in this regard, that a dugout canoe such as was being used when

the deceased met his demise is so low that an occupant of the same cannot hit against it in a way that could cause a blunt trauma of the nature that had caused the deceased's death.

According to the evidence of PW5, when a canoe such as the one which the deceased and the appellant had been using was being used in an operation such as was the case in relation to the subject one, the people in the canoe would be seated.

According to the trial Judge, the deceased's death could not also have arisen as a result of drowning. This finding was not only consistent with the evidence of all the witnesses who had seen the deceased's body immediately after it was retrieved from the river but that of PW7, the medical doctor who had conducted a postmortem examination on the body.

According to PW7's further evidence which the trial court accepted, the deceased had died prior to his falling into the river as a result of severe beatings. The court also accepted PW7's evidence to the effect that the deceased had not died as a result of drowning not least because his body did not manifest symptoms suggestive of death by drowning.

Having regard to the totality of the evidence which had been placed before her ladyship, that is to say, the medical evidence of PW7, the evidence of the other prosecution witnesses, as well as the evidence of the appellant herself, and having regard to all other possible inferences as to what could have been responsible for the death of the deceased, the only inference which the learned trial judge deemed appropriate to draw was that the deceased did not die as a result of drowning but that he died as a result of severe beatings at the hands of the appellant who was the only person who was last seen with the deceased when the latter was alive.

The trial judge also concluded that the appellant had deliberately delayed his return home after he (and the deceased) had parted with PW4 so that he could execute his crime. The Judge reasoned that the blunt trauma on the deceased's chest and ribs to which PW7 had attributed the deceased's death had been a consequence of the paddle which the appellant had used to hit the deceased. The trial Judge also observed that the killing of the deceased had been conceived by the appellant and PW5, with the latter having played the role of convincing the deceased to

accompany the appellant on the river with the full knowledge that the deceased could neither swim nor paddle a canoe. The Judge further reasoned that by inflicting the injuries which the appellant had inflicted upon the person of the deceased he did have the necessary malice aforethought to cause the deceased's death. The Judge also noted that the appellant had neither any defence nor a lawful justification to cause the deceased's death.

Having examined the judgment of the trial court in the context of the evidence which had been placed before that court and the arguments of counsel on either side, we have come to the conclusion that, although the trial court's analysis and conclusions were, in some minor respects, less than impeccable or could have been better refined, the totality of that evidence, viewed in the light of the legal principles which we examined early on in this judgment, took the appellant's case out of the realm of conjecture and attained such a degree of cogency which could permit only an inference of guilt.

Indeed, on the basis of the principles which were highlighted in the cases of **Bwanausi**[3], **Kape**[6], **Zulu**[1], **Banda**[7], **Nyambe**[4] and the South African case of **R v. De Villiers**[9] as we discussed them

early on in this judgment, the cumulative facts or pieces of evidence surrounding the deceased's death had taken the case out of the realm of conjecture and had attained such a degree of cogency which could only permit an inference of guilt to be drawn against the appellant.

Although, in **Naweji v The People**[10], we criticized the trial court when we said that the correct test or approach to employ when a court is faced with circumstantial evidence as the only basis for drawing an inference of guilt is not whether or not such evidence is strong, but rather,

> **"...whether the inference of guilt is the only one reasonably possible [from such evidence]"**,

we did say, in our subsequent decision in **Nyambe**[4] that, where

> "...**pieces of evidence, though circumstantial, are so strong ...it is irresistible to draw the inference of guilt".**

On the facts of the matter with which we are presently concerned, the evidence which was placed before the trial judge, as discussed above, was quite compelling, particularly in the light of the appellant's inconsistent and unreasonable explanations as to how the deceased had met his demise. In this regard, it will be recalled that, when the appellant had the earliest opportunity to

explain how the deceased had met his unexpected death he told PW5 that, as he and the deceased were paddling home,

> "*[the deceased] was dozing and as he was dozing the canoe went one side and thereafter we got drowned*" .

Under cross-examination, the appellant told the trial court:

> *"While we were in the canoe [with the appellant] he was in front of me. I was paddling and he was also paddling. Whilst he was there I just saw like something made him to stand up from where he was seated and thereafter he hit himself [against] the canoe and he fell in the water... My lady he was seated and he was paddling, I was surprised he squatted and thereafter he fell in the river..."*

Early on in this judgment, we did highlight PW3 (the deceased's wife)'s unchallenged evidence to the effect that the deceased did not know how to paddle a canoe, hence the decision by PW5 to have him (the deceased) travel with the appellant who was a skilled paddler.

In highlighting the preceding narrative we have not lost sight of the observations we made in **Kape**[6] when we said:

"Whatever the reason, the lie told by the appellant in court does not inevitably lead to an inference of guilt".

We must stress, however, that, notwithstanding the statement which we made in **Kape**[6], as quoted above, we did not, thereby, suggest that an accused person against whom an inference of guilt can otherwise be legitimately drawn can, as a general rule, have such inference discounted or negatived by his own deliberate lies or inconsistent testimony. What we meant by the statement in question is that, if, having regard to all the evidence, and taking into account all the relevant factors and considerations which a court, as a trier of fact, is bound to take into account, an accused person tells a lie or gives inconsistent testimony, such a lie or inconsistent testimony cannot properly form the sole basis of drawing a guilt inference against him or her but that such a lie or inconsistent testimony must be considered in the light of the totality of the evidence at the court's disposal.

In sum, we agree with the learned trial judge that, having regard to the totality of the evidence which had been placed at her disposal, the inference pointing to the appellant's guilt was not only

the only reasonable one which she could nave drawn but it was, in truth, the most appropriate one.

In consequence, we decline to interfere with the appellant's conviction and dismiss this appeal in its entirety.

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M. MUSONDA, SC
SUPREME COURT JUDGE

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J. K. KABUKA
SUPREME COURT JUDGE

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J. CHINYAMA
SUPREME COURT JUDGE